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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUSTIN THOMAS CORDERO,

Defendant and Appellant.

A147102

(Lake County
Super. Ct. No. CR940322)

Defendant Justin Thomas Cordero pleaded no contest to the felony offense of receiving stolen property (Pen. Code,¹ § 496d). At sentencing the court imposed a term of three years to be served entirely in county jail. On appeal defendant argues the trial court abused its discretion in refusing to impose a split sentence, which would allow him to serve a portion of the three-year term on mandatory supervision.² We affirm.

¹ All further unspecified statutory references are to the Penal Code.

² “A split sentence is a hybrid sentence in which the court suspends execution of a portion of the term and releases the defendant into the community under the mandatory supervision of the county probation department. Such sentences are imposed pursuant to section 1170, subdivision (h)(5) . . . , a provision originally adopted as a part of the ‘2011 Realignment Legislation addressing public safety.’ [Citation.]” (*People v. Camp* (2015) 233 Cal.App.4th 461,464, fn. 1.)

FACTUAL AND PROCEDURAL BACKGROUND³

On or about September 17, 2015, the police were dispatched in response to a homeowner's report of a burglary. The homeowner reported the theft of a metallic blue golf cart, valued at \$4,000, a generator, and a golf cart battery charger. The next day, the police were dispatched in response to a report that three men were seen pushing a golf cart through a creek. At the scene, a police officer saw the three men attempting to push a white golf cart through the creek. The police officer noticed that paint had recently been applied to the golf cart, but was able to see unpainted areas of the golf cart were blue. One man walked away, while the police officer approached defendant and his codefendant. Defendant and his codefendant informed the police officer that they found the golf cart in the creek and were in the process of taking it to their residence. The men also said they had made no attempt to locate the owner of the golf cart. Both defendant and his codefendant were arrested and taken to jail. During the booking process, the police officer saw white paint on defendant's pants and belt, which paint was consistent with the paint seen on the golf cart. When questioned about the paint on his clothing, defendant said he was helping his sister paint her home. However he was not able to provide his sister's name or her residential address.

Following the filing of a complaint, defendant pleaded no contest to the felony offense of receiving stolen property. As part of a plea agreement, defendant understood he could be sentenced to the upper term of three years to be served in county jail, but there was no agreement as to whether the term would be a split sentence under section 1170, subdivision (h)(5).

Before sentencing, the probation department submitted a report recommending that the court sentence the 31-year-old defendant to a term of three years to be served in county jail. The probation department officer opined that a split sentence (county jail and mandatory supervision) was not appropriate based on a number of factors specific to

³ Because defendant waived his right to a preliminary hearing, the description of the circumstances of the crime are taken from the probation department presentence report and the factual recitation given by the prosecutor at the change of plea proceeding.

defendant, including criteria listed in California Rules of Court, rule 4.415⁴:

(1) defendant posed a danger to public safety based on his “moderate” criminal history,

⁴ California Rules of Court, rule 4.415 reads: “(a) Presumption [¶] When imposing a term of imprisonment in county jail under section 1170(h), the court must suspend execution of a concluding portion of the term to be served as a period of mandatory supervision unless the court finds, in the interests of justice, that mandatory supervision is not appropriate in a particular case. Because section 1170(h)(5)(A) establishes a statutory presumption in favor of the imposition of a period of mandatory supervision in all applicable cases, denials of a period of mandatory supervision should be limited. [¶] (b) Criteria for denying mandatory supervision in the interests of justice [¶] In determining that mandatory supervision is not appropriate in the interests of justice under section 1170(h)(5)(A), the court’s determination must be based on factors that are specific to a particular case or defendant. Factors the court may consider include: [¶] (1) Consideration of the balance of custody exposure available after imposition of presentence custody credits; [¶] (2) The defendant’s present status on probation, mandatory supervision, post release community supervision, or parole; [¶] (3) Specific factors related to the defendant that indicate a lack of need for treatment or supervision upon release from custody; and [¶] (4) Whether the nature, seriousness, or circumstances of the case or the defendant’s past performance on supervision substantially outweigh the benefits of supervision in promoting public safety and the defendant’s successful reentry into the community upon release from custody. [¶] (c) Criteria affecting conditions and length of mandatory supervision [¶] In exercising discretion to select the appropriate period and conditions of mandatory supervision, factors the court may consider include: [¶] (1) Availability of appropriate community corrections programs; [¶] (2) Victim restitution, including any conditions or period of supervision necessary to promote the collection of any court-ordered restitution; [¶] (3) Consideration of length and conditions of supervision to promote the successful reintegration of the defendant into the community upon release from custody; [¶] (4) Public safety, including protection of any victims and witnesses; [¶] (5) Past performance and present status on probation, mandatory supervision, postrelease community supervision, and parole; [¶] (6) The balance of custody exposure after imposition of presentence custody credits; [¶] (7) Consideration of the statutory accrual of post-sentence custody credits for mandatory supervision under section 1170(h)(5)(B) and sentences served in county jail under section 4019(a)(6); [¶] (8) The defendant’s specific needs and risk factors identified by a validated risk/needs assessment, if available; and [¶] (9) The likely effect of extended imprisonment on the defendant and any dependents. [¶] (d) Statement of reasons for denial of mandatory supervision [¶] Notwithstanding rule 4.412(a), when a court denies a period of mandatory supervision in the interests of justice, the court must state the reasons for the denial on the record.” California Rules of Court, rule 4.412(a) provides that it “is an adequate reason for a sentence or other disposition that the defendant, personally and by counsel, has expressed agreement that it be imposed and the

which included four juvenile adjudications (battery and theft offenses) (ages 13-17), and several adult felony and misdemeanor convictions (theft and drug possession offenses) (ages 21-29), for which defendant served four prior prison terms; (2) defendant had exerted minimal effort to comply with the terms and conditions of community supervision based on his “poor” or “terrible” past performance on probation, parole, post release community supervision (PRCS), and mandatory supervision;⁵ (3) a risk assessment was conducted, using the Strong Assessment Tool, which indicated defendant was a high risk for reoffending by committing additional crimes in the future; and (4) defendant was a member of a criminal street gang.

At sentencing, the court stated it had read and considered the probation department report, which was admitted into evidence pursuant to the parties’ stipulation. The prosecution submitted the matter on the probation department’s recommendation. Defense counsel made no argument. Following the probation department’s recommendation, the court imposed a three-year term to be served entirely in county jail. Defendant was granted presentence credit for time served of 105 days. Addressing mandatory supervision, the court stated, in pertinent part: “[G]iven [defendant’s] history, alleged affiliations, prior performance on mandatory supervision as well as probation and parole, I find, in the interest of justice, that mandatory supervision should not be ordered.”

prosecuting attorney has not expressed an objection to it. The agreement and lack of objection must be recited on the record.”

⁵ As a juvenile, defendant violated probationary terms on four occasions. As an adult, (1) after his 2005 release from state prison for a felony theft offense, he twice violated the terms of his parole and each time returned to prison, (2) after his 2011 release from state prison for a felony theft offense, he violated the terms of his PRCS by committing a new criminal offense (felony drug possession), for which PRCS was terminated unsuccessfully and he was sentenced on the new offense to a split term of 3 years in county jail and one year of mandatory supervision; (3) while on mandatory supervision in 2013, he committed a new offense (felony drug possession), mandatory supervision was permanently revoked, and he was sentenced on the new offense to three years in county jail. Two years later, defendant was released from jail, and three months thereafter, defendant was arrested for the current offense.

DISCUSSION

On appeal, defendant's sole contention is that the trial court abused its discretion in denying mandatory supervision in the interests of justice.⁶ He specifically contends the trial court was "guided by a misapplication of the relevant sentencing factors," challenging (a) its reliance on defendant's criminal history, alleged gang affiliation, and his past performance on community supervision, and (b) its failure to consider, to wit, the circumstances of the current offense, that defendant was not on community supervision at the time of the current offense, that he faced a substantial time in custody even after application of 105 days of presentence credit, and that, in light of his history of substance abuse, he would "undoubtedly benefit from treatment and supervision to aid in his successful reentry into the community upon his release from jail."

However, defendant correctly concedes he has forfeited his appellate claim of error by his failure to lodge an objection in the trial court on the ground he now asserts on appeal. (See *People v. Scott* (1994) 9 Cal.4th 331, 353 ["waiver doctrine should apply to claims involving the trial court's failure to properly . . . articulate its discretionary sentencing choices," including when "the stated reasons allegedly do not apply to the particular case"]; *Id.* at p. 355 [waiver doctrine should apply to a claim that sentencing factors were "inapplicable . . . and improperly weighed"]; *People v. Brown* (2000) 83 Cal.App.4th 1037, 1041-1042 [alleged use of improper circumstances for sentence is not jurisdictional error that can be raised on appeal without objection in the trial court].)

In all events, we see no merit to defendant's argument that the trial court misunderstand its legal obligations. The court's reasons for its denial of mandatory supervision in the interests of justice references appropriate factors specific to defendant: his criminal history, including his alleged affiliation with a criminal street gang, and defendant's past performance on community supervision. To the extent defendant argues

⁶ We agree with defendant that nothing in his plea agreement precluded the trial court from imposing a split sentence, allowing for a portion of the three-year term to be served on mandatory supervision. Accordingly, his challenge to the court's sentencing decision may be raised on appeal without a certificate of probable cause. (*People v. Buttram* (2003) 30 Cal.4th 773, 776; § 1237.5; Cal. Rules of Court, rule 8.304(b).)

to the contrary, we note that California Rules of Court rule 4.415(b) places no limits on the nature of factors that a court may consider in denying mandatory supervision in the interests of justice, except that the factors must be “specific to a particular case or defendant.” (*Ibid.*) Additionally, the court here met its legal obligations to set forth “the reasons for the denial on the record” (Cal. Rules of Court, rule 4.415(d)), stating “in simple language the primary factor or factors that support[ed] [its] exercise of discretion” (Cal. Rules of Court, rule 4.406(a)). (*Ibid.* [the trial court’s statement of reasons “need not be in the language of these rules”].) Nor does the court’s failure to specifically mention certain factors demonstrate it did not consider them, as defendant suggests. Having read and considered the probation report before imposing sentence, the court was well aware of the factors that defendant now argues it should have considered.⁷ In the absence of an “explicit” statement by the court, we presume “the court properly exercised its legal duty to consider all possible . . . factors in determining the appropriate sentence.” (*People v. Oberreuter* (1988) 204 Cal.App.3d 884, 888.)⁸

⁷ Specifically, the probation department report indicated the circumstances of the current offense, that defendant was not on any type of community supervision at the time of the commission of the current offense, that defendant would be entitled to 105 days of presentence credit as of the date of sentencing, that defendant had a demonstrated history of substance abuse, and that appropriate programs existed in Lake County to meet defendant’s needs.

⁸ Because defendant has not shown on this record prejudicial error requiring a remand for resentencing, his contention that his trial counsel was ineffective for failing to object to the court’s reasons for denying mandatory supervision in the interests of justice must fail. (*Strickland v. Washington* (1984) 466 U.S. 668, 697; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

DISPOSITION

The judgment is affirmed.

Jenkins, J.

We concur:

Pollak, Acting P. J.

Siggins, J.